Supreme Court, U.S.
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No. 97-1041

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MAENETTE B. SMITH, *et vir.*,

Petitioners,

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF of PETITIONERS

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REPLY BRIEF of PETITIONERS

I. *RES JUDICATA*, PRIVITY and INCONSISTENT OPINIONS: Respondents argue that the **subdivision case** is not *res judicata* stating that at no time did the order of court in the subdivision case address the zoning status of Petitioners property. True, the order itself did not address the status of the zoning of the property because everyone including the Judge, MNCPPC, and the Smiths, understood and agreed that the zoning of the property was all in the CSC zone. The court order did, however, expressly approve the subdivision plat of the subject property having the understood and agreed CSC zoning category clearly marked on it[1]. Further, the issue of zoning is an issue in a subdivision case as clearly testified to by the MNCPPC employee in the **administrative appeal case**. Other reasons why zoning is an issue in the subdivision case are cataloged at page 26 of the Petition for Writ of Certiorari. Even assuming, *arguendo*, that the zoning was not raised, it clearly could have been raised. *Res judicata* clearly applies to all of the issues that were raised or could have been raised, *Warner v. German*, 100 Md.App. 512, 518, 642 A.2d 239 (1994), "[A] judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit."

Respondents argue with respect to the administrative appeal case that no privity has been established between the MNCPPC and the County, that they are separate legal entities, and that finding privity because of the joint representation or joint briefs would penalize Respondents

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[1] Petitioners' Appendix N and O, App. 124a-127a, item no. 3 at 127a.

"...for exercising judicial economy in the filing of its pleadings." The *res judicata* privity argument clearly does not 'penalize' the Respondents but merely recognizes the reality of the relationship and the common, and, in fact, identical[2], interests of both the MNCPPC and Prince George's County as parties in the administrative appeal case. *Warner, supra.* A brief review of the record of the proceedings before the Board of Appeals clearly shows that both the County and MNCPPC were represented by counsel (same attorneys who are 'of counsel' on Respondents' Brief in Opposition), and that the attorney for the MNCPPC controlled the proceedings, Petitioners' Appendix Z, App. 177a-186a. Further, once MNCPPC had been dismissed as a party, Mr. Marks, although an employee of the MNCPPC, continued to control the litigation by representing the County[3].

Respondents further argue that since they had no right to appeal the administrative appeal case, that it is not *res judicata* as to them. It is respectfully submitted that where there is privity, there need be no right to appeal to have the administrative case considered *res judicata*, *Warner, supra.*

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[2] Nowhere in any of these proceedings has there been a divergent interest expressed between MNCPPC and Prince George's County because there is no different interest; they were both represented by the same attorney (the staff attorney for the MNCPPC) in the administrative appeal case.

[3] Respondents argue in their footnote 12 that the representation was *individually* and that the MNCPPC was not representing the County. It is submitted that the Maryland Lawyers' Rules of Professional Conduct, Respondents' Appendix BE, App. 188a, prohibit an attorney from representing a client whose interests are materially different than a former client. The interests of the MNCPPC and the County were clearly the same; otherwise, the attorney for the MNCPPC would have been prohibited for subsequently representing the County. Counsel for the Respondents was a staff attorney for the MNCPPC and it could be argued that he was an agent or employee of the MNCPPC when he represented the County.

Further, Maryland law provides that trial courts and appellate courts are bound by the fact finding of administrative bodies if there is substantial evidence, as here, to support the findings, *Maryland State Dept. of Education v. Shoop*, 119 Md.App. 181, 704 A.2d 499 (1998).

The Respondents make a frivolous argument in their footnote 8 that the Petitioners are the only parties bound by the Board of Appeals decision and suggest that they are not bound by the decision since they did not have a right to appeal it even though they actively participated in and controlled the presentation of evidence at the Board of Appeals. Accordingly, they are bound by the decision.

Neither the trial court nor the 2nd CSA addressed the issue of privity as it relates to *res judicata* and, thus, clearly did not properly state or apply the Maryland law as it relates to *res judicata*.

Respondents further argue that the decisions of the 1st CSA and the 2nd CSA are not inconsistent because different questions were raised on appeal. On the contrary, both panels of the same court had before them the same issues raised by Petitioners' Motions for Summary Judgment that included the issues of *res judicata* as to the subdivision case, the decision in the administrative appeal case[4], estoppel, detrimental reliance, as well as MNCPPC changing the zoning map without notice or hearing and then relying on the changed zoning map to deny a building permit. In addition, both panels of the same court had the 42 U.S.C. 1983 claim before them but, nevertheless, rendered inconsistent opinions. Respondents further argue that it is not inconsistent for the same court to reach different conclusions because of the different questions raised. The major inconsistencies, of course, are the remand by the 1st CSA for a factual

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[4] The administrative appeal case had not been final when the 1st CSA made its decision and the 1st CSA stayed this case pending the outcome of the administrative appeal case.

determination by a jury on whether or not MNCPPC had changed the zoning map of the subject property and the trial court and the 2nd CSA totally ignoring that issue, but deciding the jury issue of fact by an assumption of facts, as well as failing to address the 42 U.S.C. 1983 claim addressed by the 1st CSA, among other inconsistencies previously discussed in the Petition.

II. BOARD of APPEALS DECISION[5]: The Prince George's Board of Appeals is that statutory administrative body charged with the responsibility of reviewing decisions relating to building permits[6].

The Board of Appeals heard all the issues relating to the building permit and decided the case favorable to the Petitioners. Both the MNCPPC and Prince George's County presented evidence and cross-examined witnesses. Both sides appealed and the appeals were later dismissed thereby making the Board of Appeals decision ***final***[7]. All issues of fact here argued by the Respondents were extensively developed and gone into before the Board of Appeals and all parties herein were represented by same counsel before that body and, in fact, the same counsel presently before the Supreme Court

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[5] The Board of Appeals decision is found at Petitioners' Appendix P. App. 128a-134a. The Board made findings of fact based on the evidence presented before it as outlined in its order after five (5) lengthy hearings lasting approximately 2 months, decided favorably to the Petitioners in a thorough and complete opinion. Essentially, the Board had before it all of the evidence relating to this case including both the Petitioners and Respondents lodgings, and all other documents referred to in the Petition for Writ of Certiorari and Reply Brief.

[6] Annotated Code of Maryland, Art. 28, § 8-107 and Prince George's County Code, § 27-229, Petitioners' Appendices BB and CC, App. 191a and 190a.

[7] The time period for appeal of the Board's decision having expired and the decision of the Board of Appeals cannot be contested again. All parties thereto, the Petitioners, MNCPPC and Prince George's County are bound by that decision, it is respectfully submitted.

and in this case were the identical counsel who were before the Board of Appeals.

It is unnecessary for this court to get into a review of the facts of this case because the decision on the facts has already been made by the Board of Appeals.

III. SMOKE SCREEN FACTS: At the outset, it is respectfully pointed out that this court need not address any issues of fact since those issues have been previously determined after lengthy hearings and a thorough and complete findings of facts and conclusions, Petitioners' Appendix P, App. 128a-134a. It is also noted that the Respondents do not dispute any facts contained in the Petitioners' Statement of the Case.

The Respondents have made innumerable references to facts that are not supported by the evidence in the case, are not correct, are incomplete, inaccurate or misleading. It is significant to note, however, that in the first sentence of the first full paragraph on page 2 of Respondents' Brief, the MNCPPC and Prince George's County, for the first time in these proceedings, now ***admit*** that they changed the zoning map of the subject property. In the same paragraph, it is unclear as to just what "zoning function" MNCPPC is claiming. It is clear from the statute, namely Art. 28, §§ 8-101, 104, 106 of the Maryland Code, Petitioners' Appendix W, App. 171a, that, with respect to the issues in this case, the MNCPPC does not have any zoning power to change the zoning maps; however, it is conceded that they do have the power to maintain and update the base maps from time to time from which a zoning map is made. It is pointed out, however, that when there is ***ANY CHANGE*** to a zoning map (like putting a changed base map with a zoning overlay thereby making a 'new zoning map') then the 'new' or 'changed zoning map' must be approved by the District

Council, and then only after notice and a hearing, as provided in the previously noted statute.

At page 3 and 13 of their Brief, Respondents' statement that they relied on their Lodging No. 1 and No. 2 to recommend denial of Petitioners' building permit application is contrary to the testimony of their own employee, Ruth Senes, who testified[8] that it was the changed zoning maps that were relied on to recommend denial of the building permit application in question. Respondents argument is also contrary to the findings of the Board of Appeals.

Like Mr. Tippett who was not aware of any distance of the zoning line from Water Street, the representative of the MNCPPC first seen when the property was being developed in 1985, and the proper governmental official, measured off the zoning line distance as 140' from the rear boundary of the Petitioners' property, and not the distance from Water Street[9]. That figure was then (in 1985) written on the '77

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[8] Petitioners' Appendix Z, mid-page App. 179a. At the bottom of page 4, Respondents claim the initial lawsuit was for damages when, in fact, it was a declaratory judgment, Petitioners' Appendix X, App. 173a.

[9] At pages 3 and 4 of the Opposition Brief, counsel argue that zoning line is measured 400 feet from the centerline of Water Street. The Prince George's County Code § 27-111, Petitioners' Appendix AA, App. 187a, provides that once subdivided and a property line established, the zoning line then follows the property line. Further, the County Code is liberal is permitting ten (10) feet variation (actually eleven [11] when you consider the one [1] foot variation granted when scaling to a zoning line with no dimensions shown on the zoning map, as here). Further, Mr. Tippett pointed out that the zoning maps did not have dimensions to zone boundaries on the maps. Respondents Appendix G, App. A-12. A close look at Respondents' Appendices B and C, App. A-3 and A-4, clearly shows the problem of MNCPPC changing maps at their whim as in the instant case. For example, at App. A-3, look at the alley to the east (right) of Lot 1 (the right lot 1) and compare it to the direction of Water Street. Then on A-4 look at the same alley and compare it to the direction of Water Street. There are

zoning map, Appendix S, App. 140a, same as hard copy, Petitioners' Lodging No. 1.

It is respectfully pointed out that both of the Respondents, MNCPPC and Prince George's County, were represented by Isaac Marks and by Maurene Epps, both same as 'of counsel' for the Respondents in their Brief in Opposition filed herein. Both the MNCPPC and Prince George's County were parties to the Board of Appeals proceedings and participated therein, Petitioners' Appendix Z, App. 177a, 178a.

Assume *arguendo* that the surveyor made a mistake. As to the '1983' claim, due process and equal protection, it makes no difference whether or not the surveyor made a mistake since the zoning map was secretly changed as now admitted by the Respondents and the changed zoning map was then used to deny building permit contrary to statute.

IV. SMITHS are UNCOOPERATIVE: Suggest a survey when none is needed[10] and then argue that the Petitioners are uncooperative because they won't agree to a survey. Change the zoning map without notice or a hearing

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vast differences in the direction of the alley relative to Water Street. This argument of the Opposition adds nothing but confuses the real issues. Looking at the curve in Church Street at App. A-3 and A-4, you will see that the 411+/- feet distance greatly exceeds the straight line distance from the property line to Water Street, that is, the ***direct*** line distance would be substantially less than 411+/- feet and still within the permitted eleven (11) foot variation. Respondents same 400 foot argument was made before the Board of Appeals and rejected by that body as clearly shown in its findings that the zoning line had not been changed. This is also clearly shown by Petitioners' Lodging No. 1 showing the '77 and '88 zoning maps superimposed. If the transparency of Petitioners' Lodging No. 1 is separated from the hard copy and then replaced, the viewer can easily see what the MNCPPC did to the property lines when they changed the zoning map in 1988.

[10] See Petitioners' Lodging No. 2, Deed of Agreement to Establish Boundary Line.

and then argue that the Petitioners had three options to correct the problem and argue that they are uncooperative and caused the dual zoning of their property. These arguments are so transparent that they do not merit serious consideration by the court in view of the fact that the County's own Board of Appeals considered all of these arguments raised here by the Respondents and decided all matters favorable to the Petitioners.

Further, the MNCPPC's own witness, Senes, testified before the Board of Appeals[11] that the Smiths met with the MNCPPC to try to resolve issues. Further, Senes testified that the unapproved and unadopted '88 zoning map[12] was used to deny the building permit[13], contrary to the representations of Counsel with respect to Respondents' Lodgings Nos. 1 and 2.

Respondents' Counsels' statements outlining the findings of the trial court and the 2nd CSA appear to be overreaching. This Court can see just what the trial court and the 2nd CSA held since those opinions are part of the record herein in Appendix C, App. 15a, and Appendix D, App. 24a.

Petitioners have never contested the authority of the MNCPPC to update base maps; however, when they put a zoning overlay over an updated base map thereby creating an new zoning map, then a notice and hearing before the District Council is required by statute, Petitioners' Appendix W, App. 172a.

Further, the Board of Appeals found that the MNCPPC had changed the boundaries of the Petitioners' property as clearly shown in Petitioners' Lodging No. 1. The

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[11] Petitioners' Appendix Z, App. 178a, at [84].

[12] There was also testimony that the unapproved '90 zoning map was used to deny the building permit although the '90 zoning map was unlawfully changed by the MNCPPC after the oral and written denial of the building permit application.

[13] Petitioners' Appendix Z, App. 180a.

records of the MNCPPC[14] show that the boundary that they so readily change was established by iron pipes and survey in 1968 with recorded Deed of Agreement to Establish Boundary Line, Petitioners' Lodging No. 2[15].

V. CONCLUSION: Maryland courts routinely give unreported opinions regarding questions of first impression and statutory interpretation[16].

This case is about more than just secretly changing a zoning map and denying a building permit based on the changed zoning map in a small county next to the nation's capital. It is about the judicial system, *stare decisis*, fundamental fairness, fair consideration of the dispositive issues with articulated reasoning that applies equally to all similarly situated landowners. It is about detrimental reliance on the proper governmental official. It is about unreported opinions on issues that have never before been decided by a state court relating to state law, due process and equal protection. It is about making those decisions applicable only to the litigants with no reasonable or rational basis for determining the unlucky candidate to have his or her opinion unpublished. It is about the perception of the state courts and

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[14] The Deed of Agreement to Establish Boundary Line, Petitioners' Lodging No. 2, was from the records of the MNCPPC in their file to the property just north of the Petitioners when it was rezoned some years previous to Petitioners' ownership. It is noted that Thomas F. Duley, et al. now own the parcel referred to in the Deed of Agreement to Establish Boundary Line as the 'Junkins property' and the owners of the 'Bowling property' were the predecessors in title to the Smiths, the Petitioners.

[15] The bearings of the property line in Opposition Lodging Nos. 1 and 2 are to the WSSC Datum, true north, and the bearings in Petitioners' Lodging No. 2, as specified in the deed, are to magnetic north. The difference between the two bearings gives the local variation (the measurement between true north and magnetic north).

[16] Petitioners' Appendix A, App. 9a, first sentence. Note that the 1st CSA was an unreported opinion.

how they do their job. It is about something we all strive to improve and perfect, even though we have differences of opinion.

It is about inconsistent opinions of the same state appellate court and the denial of a jury trial and a cause of action created by 42 U.S.C. 1983[17].

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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*Counsel of Record

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[17] All of the facts necessary to find the Respondents liable pursuant to 42 U.S.C. 1983 have been found by the Board of Appeals. It could be said from this case that Maryland does not recognize a claim under 42 U.S.C. 1983 notwithstanding that the 1st CSA indicated that the 42 U.S.C. 1983 case was well pled and remanded it for a jury trial whereas the same court in the 2nd CSA, by its holding, did not recognize or even comment on the 42 U.S.C. 1983 claim.

APPENDIX W[1]

Article 28, Annotated Code of Maryland (1995 Replacement Volume) [pertinent portions, emphasis added]

§ 8-101. Powers generally.

(a) Designation of district councils; bi-county district council. - The County Councils of Montgomery County and Prince George's County are each individually designated, for the purposes of this article, as the ***district council*** for that portion of the regional district lying within each county, respectively. ...

(b) Grant of zoning power. -

... (2) ... each ***district council,*** respectively, in accordance with the conditions and procedures specified in this article, may by ordinance adopt and amend the text of the zoning ordinance and ***may by resolution or ordinance adopt and amend the map or maps*** accompanying the zoning ordinance text to regulate, in the portion of the regional district lying within its county,... ...and (vi) the uses of land, ...

* * *

§ 8-104. Amendments to zoning regulations - Generally.

(a) Authorized procedure. -

(1) ***After duly advertised public hearing each district council*** from time to time ***may amend*** its regulations or any regulation, including ***the maps or any map,*** in accordance with procedures established in the respective zoning ordinances. ...

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[1] The Appendix letters and page numbers for the Reply Brief are continued in sequence from the Appendix to the Petition for Writ of Certiorari except that page number 170a is omitted since there is nothing printed on it and to conform to the customary printing practice of having the odd numbered pages on the right.

§ 8-106. Same - Hearings and appeals in Prince George's County.

... (d) Definitions for sections. - For purposes of this section and §§ 8-104 and 8-105 of this article herein, the word ***"amend"*** or "amendment" ***shall be deemed to include*** any modification of the text or phraseology of a regulation or of any provision of the regulations, or any repeal or elimination of any regulation or part thereof, or any addition to the regulations, or any new regulation, or ***any change*** in the number, ***shape, boundary, or area*** of the districts, or of any district, or any repeal or abolition of any map or part thereof, ***or any addition to any map, or any new map, or any other change in the map or maps.*** ...

APPENDIX X

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

MAENETTE B. SMITH, et vir, v. MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, et al.
CAE 89-24602, Filed, Dec. 27, 1989

COMPLAINT FOR DECLARATORY JUDGMENT
and
OTHER RELIEF

* * *

WHEREFORE, your Plaintiffs pray:

1. That the Court enter an Order declaring that the entirety of Lot One 'Marlborough House' is in the CSC zone and was in the CSC zone when the building permit application was filed in this matter.

2. That the Court declare that the zoning laws, and other laws, ordinances, rules, and regulations, to the extent that they were or are valid, relating to the development of Lot One 'Marlborough House', shall be the zoning laws, and other laws, ordinances, rules, and regulations of Prince George's County, Maryland National Capital Park and Planning Commission, and the Town of Upper Marlboro, Maryland, that were in effect on the date of the filing of the building permit application 10708-89-CGU or the date of filing this Complaint.

3. For costs, interest, and attorney fees.

4. And for such other and further relief as the Court may deem just and proper.

/s/ Jess Joseph Smith, Jr.
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APPENDIX Y

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

CASE NO. CAE 89-24602
MAENETTE B. SMITH, *et vir*, Plaintiffs,
vs.
MARYLAND NATIONAL CAPITAL PARK & PLANNING COMMISSION, *et al.*, Defendants.

NOTE: Except for page number references that are in brackets, all other brackets have been inserted to cross-reference documents referred to in the Appendices of the instant case or explain references.

Deposition of: WARD BOURGONDIEN [MNCPPC Employee]
Date of deposition: 5/9/95

[42] BY MR. SLATKIN: [Counsel for Petitioners]

Q You are saying it doesn't change the zoning, but it does change the zoning map?

A. The only way the zoning changes is through a zoning application. That's the best way I can answer that question for you.

Deposition of: ROSCOE TIPPETT [Petitioner's surveyor]
Date of deposition: 7/19/95

[44] Q Okay. I now refer you to Exhibit No. 5--[same as Respondents' Lodging No. 2, these proceedings]

A Correct.

Q -- which shows a bearing for the subdivision line on the Smith property --

A Yes, sir.

Q -- between the CSC and the R-80 portions of that property. What is the bearing that you've assigned to that subdivision line?

A I've assigned north 19 degrees, 19 minutes and 24 seconds, and it's taken from the WSSC meridian --

Q Okay.

A -- which is a true north meridian, which is totally different from Stanley Machen's plot.

Q Well --

A Stanley Machen's plot and this have no relations whatsoever in bearings.

Q Okay. Let me ask you. You said that you've "taken that from a WSSC meridian, which is a true north meridian"?

A Yes, sir.

Q And that is opposed to a magnetic --

[45] A Correct, sir.

* * *

APPENDIX Z

THE PRINCE GEORGE'S COUNTY GOVERNMENT
BOARD OF ADMINISTRATIVE APPEALS
CAB
Upper Marlboro, Maryland
J.J. Smith, Petitioner
ZONING APPEAL

No. 10482

NOTE: The following excerpts from transcripts are from proceedings that took place on five (5) different occasions from 6/6/90 through 8/8/90. All testimony was under oath.

[29] CHAIRMAN TANCHEL: Zoning Appeal 10482. Jess Joseph Smith Jr. and Maenette B. Smith. Appeal from inaction or denial by Department of Environmental Resources and notice stating that Permit No. 10708-89-CGU for the construction of an office building with parking at 14520 Church Street in Upper Marlboro, Maryland, has been recommended for denial.

I see we have a full house tonight. Starting on my right?

MR. SMITH: Yes, sir. My name is J.J. Smith. I am an attorney in Upper Marlboro, and the petitioner, I believe, or one of the petitioners.

CHAIRMAN TANCHEL: Thank you, Jess. Maureen?

MS. EPPS: Maureen Epps, Associate County Attorney on behalf of the Department of Environmental Resources.

MR. CARR: Jim Carr with the Department of Environmental Resources, Permits Office.

MR. SMITH: Isaac Marks, I am sure, will be in shortly. He was in the other room in there.

MR. MARKS: I didn't think Park and Planning was a party in this appeal.

CHAIRMAN TANCHEL: Well, everybody is a party in this thing, from what I can see.

[30] MR. MARKS: In that case, for the record, Isaac Marks, Associate General Counsel for the Park and Planning Commission.

* * *

RUTH SENES [MNCPPC Employee]

[84] BY CHAIRMAN TANCHEL:

Q One of the things that Mr. Carr said, that when there is a recommended denial by the Park and Planning, he expects the applicant to attempt to work it out with Park and Planning. Has this been attempted?

A That is correct. Yes, the applicant did come in, met initially—to the best of my knowledge, anyway. I have seen a follow-up letter from one of my permit reviewers. He then had two subsequent meetings with me. The second meeting, he summed up the results in writing, and I responded back to him in writing, and I have a copy of his letter to me and my letter to him.

* * *

[104] THE WITNESS: Mr. Smith specifically subpoenaed this map.

MR. MARKS: And this is the map that the Permit Review Division used to make their initial decision.

CHAIRMAN TANCHEL: OK. Based on that, we will allow Ruth to put this into evidence. We will also look at [105] the zoning map that you have mentioned at the appropriate time.

THE WITNESS: All right. With regard --

CHAIRMAN TANCHEL: Do we have this listed?

THE WITNESS: No, this would be next exhibit.

MS. BURCH: That would be No. 10 [same as Petitioners' Lodging No.1, transparency, these proceedings, that is, the 8/22/88 zoning map].

MR. SMITH: Probably the best way to identify it is that it is the map dated, circled red there, for the date that is circled in red.

MR. THOMAS: 3/22/88? [Typographic error, should be 8/22/88]

THE WITNESS: Uh huh.

CHAIRMAN TANCHEL: Exhibit 10 [this was government exhibit 10, that is the same as Petitioner's exhibit 27 that is the same as Petitioners' Lodging No.1, transparency, these proceedings, the 8/22/88 zoning map] now is the zoning map that Ruth used --

THE WITNESS: That is correct. And this is the map that we had a copy of when we first reviewed, did the file review in my office on this application. ...

* * *

[107] MR. SMITH: I will testify later on. It's my understanding that that was the first time I saw this map that is referred to as Exhibit No. 10 [this was government exhibit 10, that is the same as Petitioner's exhibit 27, that is the same as Petitioners' Lodging No.1, transparency, these proceedings, the 8/22/88 zoning map] was after I had applied for a building permit. It was not in existence – well, I guess it was in existence in 1988, but it is not an adopted and approved zoning map, so it's of no value, I would respectfully submit. But it's something that the [108] Park and Planning Commission –

CHAIRMAN TANCHEL: OK. Well, I understand what you are saying. Let's continue with Ms. Senes' testimony.

THE WITNESS: All right. In any event, after Mr. Smith's concerns were raised –

MR. MARKS: Let's address DER recommended –

THE WITNESS: OK. Mr. Tanchel asked me did we still recommend against it, and the reason we still recommend against it is based on this zoning map [this was government exhibit 10, that is the same as Petitioner's exhibit 27, that is the same as Petitioners' Lodging No.1, transparency, these proceedings, the 8/22/88 zoning map].

MR. MARKS: OK.

* * *

JEAN SCHMUHL [Clerk to the District Council]

[132] MR. SMITH: That is, Exhibit 33 is the adopting resolution of the zoning map as shown on Exhibit 33(a) [same as Petitioners' Lodging No. 1, hard copy, these proceedings] is that correct?

MS. SCHMUHL: That's correct.

MR. SMITH: Since the adoption of Resolution CR-73-1977 and zoning map --I'm sorry, and Exhibit 32(a) [same as Petitioners' Lodging No. 1, hard copy, these proceedings] -- since that time, with respect to the subject property, there have been no other zoning maps that have been adopted and approved by the District Council. Is that correct?

MS. SCHMUHL: With regard to the subject property?

MR. SMITH: With regard to the subject property.

MS. SCHMUHL: That is correct.

* * *

RUTH SENES [MNCPPC Employee]

[160] BY MR. SMITH:

Q I see that. Now that 400 feet that you are referring to is not shown on the zoning map.

A That is correct.

* * *

[170] Q Have there been any changes on the subject property zoningwise that you are aware of since the map of Exhibit 32-A? [same as Petitioners' Lodging No.1, hard copy, these proceedings] That is the adopted and approved Sectional Map Amendment?

A. None whatsoever, and the zoning line appears in the same spot on every one of them.

* * *

[207] MR. SMITH: OK. And the zoning map, as shown on Exhibit 32(a) [same as Petitioners' Lodging No. 1, hard copy, these proceedings] duplicate and original, the zoning of the properties, the subject properties, remains the same today as it did in 1972. Is that correct?

MS. SENES: Do you mean in 1978?

MR. SMITH: I'm sorry, in 1977.

MS. SENES: Seventy-seven. That is correct.

* * *

[227] MR. SMITH: And the District Council are the only people who can adopt and approve zoning maps. Is that correct?

MS. SENES: That's correct.

* * *

[234] MR. SMITH: And the next time that the District Council meets, they have to meet to approve your changes. Is that correct?

MS. SENES: I can only state that I have never known of the Council to approve any changes other than a Sectional Map Amendment.

MR. SMITH: All right.

MS. SENES: They do not review the map.

MR. SMITH: And that's the way you zone and rezone property is by Sectional Map Amendment. Is that correct?

MS. SENES: Or by individual zoning application.

MR. SMITH: Or by individual zoning application. Is that correct?

MS. SENES: That is correct.

MR. SMITH: And none of those have transpired with respect to the J.J. Smith and Maenette Smith Property shown on Exhibits 32(a) [same as Petitioners' Lodging No. 1, hard copy these proceedings]. Is that correct?

MS. SENES: I have stated a number of times, to the best of my knowledge that is correct.

* * *

[280] MR. SMITH: By "this" now we are talking about Exhibit 32(a) duplicate [same as Petitioners' Lodging No. 1, hard copy these proceedings].

MS. SENES: Exhibit 32(a) [same as Petitioners' Lodging No. 1, hard copy these proceedings].

MR. SMITH: That's what I'm trying to focus in [281] on.

MS. SENES: That is correct.

MR. SMITH: This is the map that Jean Schmuhl, the Clerk of the District Council brought in here as the only map that has been adopted and approved by the District Council as we sit here today, or at least when she testified on June 26th? Do you recall that?

MS. SENES: Barring any other action that should be noted on this map.

MR. SMITH: Yes, that is correct. And this was the map that was in existence at that time?

MS. SENES: That is correct.

MR. SMITH: So it doesn't make any difference when the property was subdivided. This zoning map right here, Exhibit 32(a) [same as Petitioners' Lodging No. 1, hard copy these proceedings] is the only existing zoning map that has been adopted and approved by the District Council. Is that correct?

MS. SENES: Actually been acted upon by the Council? Yes.

MR. SMITH: Actually been acted upon --

MS. SENES: Yes.

MR. SMITH: --adopted and approved --

MS. SENES: That is correct.

* * *

[286] MR. SMITH: Exhibits numbered 10 and 11 ['88 and '90 zoning maps] have not been adopted or approved the District Council. Is that correct?

MS. SENES: That is correct.

* * *

ROSCOE TIPPET [Petitioner's surveyor]

[299] MR. MARKS: So, in that case, in light of the testimony, again I would have to just note an objection. He doesn't know if Dean Armstrong actually reviewed it.

THE WITNESS: I had conversation with Dean Armstrong, so he was privy to the review information prior to the Subdivision Review Committee. He would have had to have had that information in order to discuss the problems that we were having with the subdivision due to dedication.

BY MR. SMITH:

Q Did anyone, including Mr. Dean Armstrong or anyone else in Park and Planning, in the subdivision review process ever indicate to you that the zoning line established between parcels A and B on Exhibit 39 [original Preliminary Subdivision Plat dated Sept., 1985] was drawn incorrectly?

A. None whatsoever.

* * *

[316] BY MR. SMITH:

[317] Q: And with respect to the information -- that is, the zoning that is shown thereon, the zoning notation --was any information provided to you or objections or any statements

from Park and Planning that those zoning designations were not correct?

A. No.

* * *

[340] MR. SMITH: Oh, I understand. I just bring it to your attention because on this particular map, Park and Planning is maintaining that the zoning line and the property line are not the same within 10 feet.

MR. MARKS: But there is testimony that it is within 10 feet.

* * *

WARD BOURGONDIEN [MNCPPC Employee]

[384] BY MR. SMITH:

Q That is not my question, sir. I know they approved it in 1977. Petitioner's Exhibit No. 1 [same as Petitioners' Lodging No. 1, hard copy, these proceedings] is the only adopted and approved zoning map of the subject property that has been adopted and approved by the District Council. Is that correct?

A. True.

* * *

ALAN HIRSCH [MNCPPC Employee, Head of Subdivision Office]

[424] BY MR. MARKS:

Q Mr. Hirsch, would you state your name and place of employment for the record, please?

A My name is Alan Smith Hirsch, and I work for the Maryland-National Capital Park and Planning Commission.

Q And in what capacity are you employed with them?

A Head of the Subdivision Office for the Park and Planning Commission.

Q Is that the office that would be responsible for subdivision of lands in Prince George's County?

A Yes, sir.

Q And are you familiar with that subdivision process?

A Yes, I am.

* * *

[430] BY MR. SMITH:

Q Sir, while we are trying to get Exhibit 6 [same as Respondents' Appendix A, App. A-1, Application for Approval of Preliminary Subdivision Plat] here, prior to this preliminary plat that you are referring to, there is an application filed. Is that correct?

A That is correct.

Q And on the application itself, it does list what the existing zoning is or what the proposed zoning, or what the zoning is?

A It lists what the proposed zoning, or what the zoning is, yes.

Q All right. And this is an application on a Park and Planning form?

A That is correct.

Q And Park and Planning wants to know what the zoning is? Right?

A That is correct.

Q And it is important to know what the zoning is because how you react or how you look at the property in the process, it depends on the zoning of the property. Is that correct?

A That is correct.

* * *

[431] Q So the zoning is important to know so that you will know which rules to apply in the subdivision regulations.

A That is correct.

Q Isn't that correct, sir?

A That is correct.

Q And that includes the commercial zone too. Isn't that correct?

A That is correct.

Q Now the amount of money that someone pays by way of a fee application relates to the zoning. Is that correct?

A. That is correct.

* * *

[434] Q Now if someone submitted an application for a preliminary subdivision plat and had a particular zoning on there and it turned out that in fact that zoning was not correct, someone would make a note of that. Is that correct?

A Depending on when it was found, yes.

* * *

[434] A We have one individual that does nothing but work with that information and is constantly bringing back to us information that is incorrect when they cross-reference it later, in later dates. We keep finding that a certain amount of information is just incorrect as submitted and then put into our system.

* * *

APPENDIX AA

THE ZONING ORDINANCE
of
Prince George's County
being also
Subtitle 27 of the Prince George's County Code

SUBTITLE 27. ZONING
DIVISION 3. ZONES AND ZONING MAPS
The Prince George's County Code
(1991 Edition)

Sec. 27-111. Boundaries of zones.

(a) In determining the boundaries of any zone shown on the Zoning Map, the following rules shall apply: ...

(4) Where zone boundaries approximately follow lot lines and are not more than ten (10) feet from these lines, the lot lines shall be considered the boundaries.

(5)Where property is subdivided, or where a zone boundary divides a lot, the location of the boundary, unless it is indicated by dimensions shown on the Map, shall be scaled to the nearest foot on the Zoning Map. ...

APPENDIX BB

Annotated Code of Maryland (Michie 1998 Repl. Vol.)

THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

Rule 1.7. Conflict of interest: General rule.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

(c) The consultation required by paragraphs (a) and (b) shall include explanation of the implications of the common representation and any limitations resulting from the lawyer's responsibilities to another, or from the lawyer's own interests, as well as the advantages and risks involved.

Rule 1.8. Conflict of interest: Prohibited transactions.

...(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation. ...

Rule 1.9. Conflict of interest: Former client.

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; ...

APPENDIX CC

THE ZONING ORDINANCE
of
Prince George's County
being also
Subtitle 27 of the Prince George's County Code

SUBTITLE 27. ZONING
DIVISION 5. APPEALS AND VARIANCES
Subdivision 1. Board of Appeals
The Prince George's County Code
(1994 Supplement)

Sec. 27-229 Powers and Duties.

(a) The Board of Zoning Appeals (known in this Division as the "Board") shall have the following powers and duties:

(1) To hear and decide appeals involving variances from the strict application of this Subtitle (commonly known and referred t in this division as variances);

(2) To hear and decide appeals where it is alleged that, in the administration of this Subtitle, there is error in the refusal of a building or use and occupancy permit, or in any other decision of the Department of Environmental Resources, the Planning Board, or any other person or body authorized to administer this Subtitle;

(3) To reverse, affirm, or modify any decision upon which the appeal is made;

(4) To compel the attendance of witnesses at hearings. The Chairman or other officers of the Board may administer oaths; ...

APPENDIX DD

Article 28, Annotated Code of Maryland (Michie 1997 Repl. Vol.)

§ 8-107. Board of zoning appeals in Prince George's County.

(a) Continuation; composition; appointment; terms.- The board of zoning appeals of Prince George's County, heretofore created, is continued. The board consists of three members, who shall be residents of that portion of the regional district within Prince George's County and appointed by the County Council of Prince George's County. The terms of members shall be four years each, dating originally from their first appointment in 1939.

(b) Vacancy; meetings; act by resolution; compensation; staff; organization and procedure; oaths; minutes.- Any member appointed for a vacancy shall serve for the unexpired term. All meetings of the board shall be public, and the members shall organize annually and elect a chairman and vice-chairman. They shall act by resolution, in which two members must concur. The compensation of members shall be as fixed by the County Commissioners of Prince George's County. The County Commissioners may provide the board of zoning appeals with executive and clerical assistance as necessary. The district council of Prince George's County may provide and specify in its zoning regulations general rules to govern the organization and procedure of the board of zoning appeals, which rules shall not be inconsistent with the provisions of this title. The board of zoning appeals may adopt, from time to time, supplemental rules of procedure not inconsistent with this title or such general rules. The board of appeals or the chairman or other officer may administer oaths and compel the attendance of witnesses. The board shall keep minutes of its proceedings.

REFERENCE TO LODGINGS

The following items were submitted to the U.S. Supreme Court Clerk's Office as a Lodging as part of this Petitioner's Reply Brief:

Lodging No. 1 -- Comprising excerpts from the pertinent parts of the zoning map of 7/12/77, Board of Appeals Petitioner's Exhibit no. 1, as a hard copy; and the pertinent parts of the zoning map of 8/22/88, Board of Appeals Petitioner's Exhibit no. 27, as a transparency.

Lodging No. 2 -- Deed of Agreement to Establish Boundary Line, first two pages.